Azhar bin Che Wil v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–53 OF 2009(C)
ARIFIN ZAKARIA CJ (MALAYA), MOHD GHAZALI AND RAUS SHARIF FCJJ
22 MARCH 2010

B

Criminal Law — Penal Code — s 35 — Nature and effect of — Whether s 35 creates substantive offence — Whether s 35 merely rule of evidence — Distinction between s 34 and s 35

C

Criminal Procedure — Charge — Amendment — Failure to amend charge — Appellant charged with other accused persons under s 302 read with s 35 of the Penal Code — Appellant called to enter defence whilst others acquitted — Charge against appellant not amended by deleting reference to other accused persons and s 35 — Whether failure prevented appellant from recalling, re-summoning witnesses or calling for further evidence — Appellant represented by counsel — Whether appellant misled or prejudiced — Whether failure to amend charge rendered charge bad in law and conviction thereunder unsafe — Criminal Procedure Code s 162

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The first accused and six others were charged in the High Court with murder under s 302 read with s 35 of the Penal Code. The sixth accused was acquitted and discharged during the prosecution's case. At the close of the prosecution's case, the second to seventh accused persons were acquitted and discharged. Only the first accused was called to enter his defence. The first accused was convicted and sentenced to death by the High Court. His appeal to the Court of Appeal together with the DPP's appeal against the acquittal and discharge of the other co-accused persons (the second, third, fourth, fifth, seventh accused persons) were dismissed. Both the public prosecutor and the first accused appealed to the Federal Court. In the Federal Court, counsel for the first accused submitted that the High Court judge had erred in not amending the charge under s 302 read with s 35 to one under s 302 only against the first accused, at the close of the prosecution's case after acquitting and discharging the other accused persons. Counsel submitted that by not amending the charge, the first accused was deprived of his right to recall witnesses. This, argued counsel, had caused a miscarriage of justice. Therefore, the conviction and sentence could not stand.

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Held, dismissing the appeal:

(1) The non-deletion of reference to the co-accused and s 35 in the charge

A either at the close of the prosecution's case or at the close of the defence's case did not render the charge bad in law. Section 35 like s 34 does not create a substantive offence. It is merely a rule of evidence open to the prosecution when several accused persons are alleged to be involved in the commission of an offence (see para 24); *Public Prosecutor v Harcharan Singh a/l Piara Singh & Anor* (Criminal Appeal No 02–22 of 2004(B), unreported) followed.

(2) Section 34 provides for a case in which a criminal act was done by several persons in furtherance of a common intention. However s 35 refers to a situation where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention and each person is liable for the act to the extent of his knowledge or intention. Under s 35, the court has to consider what is the knowledge or intention of each person who joined in committing the act (see para 26).

(3) The fatal injury that caused the victim's death was inflicted by the first accused. The assaults on the victim involving second to seventh accused persons could not have caused the death of the victim. Thus, when the second to seventh accused were acquitted and only the first accused was ordered to enter his defence, the first accused had to be aware of the evidence against him. This was especially so when he was represented by counsel (see para 28).

(4) The first accused was in no way misled or prejudiced by the non-amendment of the charge. The way the defence was presented made it amply clear that the first accused fully appreciated the nature of the charge against him and the nature of the prosecution's case (see para 29).

(5) Even without the charge being amended, the first accused — who was represented by counsel — was not precluded from recalling or re-summoning any witness or to call for further evidence. This was not done. Thus, the question of miscarriage of justice as contended by counsel, did not arise (see paras 30 & 32); *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314 followed; *Moosa Abdul Rahman v The State of Kerala* [1982] Cr LJ 1384 referred.

(6) The omission of the trial judge to amend the charge either at the close of the prosecution's case or at the close of the defence's case, so as to delete any reference in the charge to the co-accused and to s 35 of the Penal Code did not cause any prejudice or injustice to the first accused. It did not render the charge bad against the first accused. The fact that the other co-accused had been acquitted had no bearing on the case against the first accused. Accordingly, there was nothing irregular concerning the conviction of the first accused on the charge of murder (see para 33).

[Bahasa Malaysia summary

Tertuduh pertama dan enam yang lain dituduh di Mahkamah Tinggi dengan kesalahan membunuh di bawah s 302 dibaca bersama s 35 Kanun Keseksaan. Tertuduh keenam dibebaskan dan dilepaskan semasa kes pendakwaan. Pada penutup kes pendakwaan, tertuduh kedua hingga ketujuh dibebaskan dan dilepaskan. Hanya tertuduh pertama dipanggil untuk membela dirinya. Tertuduh pertama disabitkan dan dihukum dengan hukuman mati oleh Mahkamah Tinggi. Rayuannya ke Mahkamah Rayuan bersama dengan rayuan timbalan pendakwa raya terhadap pembebasan dan pelepasan lain-lain tertuduh bersama (tertuduh kedua, ketiga, keempat, kelima dan ketujuh) ditolak. Kedua-dua pendakwa raya dan tertuduh pertama merayu ke Mahkamah Persekutuan. Di Mahkamah Persekutuan, peguam tertuduh pertama menghujah bahawa hakim Mahkamah Tinggi telah khilaf apabila tidak meminda tuduhan di bawah s 302 dibaca bersama s 35 kepada hanya satu iaitu di bawah s 302 terhadap tertuduh pertama, pada penutup kes pendakwaan setelah membebaskan dan melepaskan tertuduh yang lain. Peguam berhujah bahawa dengan tidak meminda tuduhan tersebut, tertuduh pertama dinafikan haknya untuk memanggil saksi-saksi. Menurut peguam, ini mengakibatkan salah laksana keadilan. Oleh itu, sabitan dan hukuman tidak berasas.

Diputuskan, menolak rayuan:

(1) Tidak memadam rujukan kepada tertuduh yang lain dan s 35 dalam pertuduhan sama ada ketika penutup kes pendakwaan atau pada penutup kes pembelaan tidak menjadikan tuduhan cacat dari segi undang-undang. Seksyen 35, seperti s 34 tidak mewujudkan kesalahan substantif. Ia hanyalah peraturan keterangan yang terbuka kepada pendakwaan apabila beberapa tertuduh didakwa terlibat dalam perbuatan sesuatu kesalahan (lihat perenggan 24); *Public Prosecutor v Harcharan Singh a/l Piara Singh & Anor* (Rayuan Jenayah No 02–22 Tahun 2004 (B)) diikut.

(2) Seksyen 34 memperuntukkan bahawa sesuatu kes yang mana perbuatan jenayah dilakukan oleh beberapa orang bagi mencapai niat mereka yang sama. Tetapi s 35 merujuk kepada situasi di mana beberapa orang bersama-sama melibatkan diri dalam perbuatan jenayah semata-mata oleh sebab perbuatan itu dilakukan dengan suatu pengetahuan atau niat dan setiap orang itu bertanggungan atas perbuatan tersebut setakat pengetahuan atau niatnya. Di bawah s 35, mahkamah perlu mempertimbangkan apakah pengetahuan atau niat setiap orang yang bersama-sama melakukan perbuatan tersebut (lihat perenggan 26).

(3) Kecederaan maut yang mengakibatkan kematian mangsa diakibatkan oleh tertuduh pertama. Serangan ke atas mangsa yang melibatkan tertuduh kedua hingga ketujuh tidak boleh mengakibatkan kematian

A mangsa. Oleh itu, apabila tertuduh kedua hingga ketujuh dibebaskan dan hanya tertuduh pertama diperintah membela dirinya, tertuduh pertama harus sedar tentang keterangan yang menentangnya. Khususnya apabila dia diwakili oleh peguam (lihat perenggan 28).

B (4) Tertuduh pertama tidak dikelirukan atau diprejudiskan oleh ketiadaan pembetulan tuduhan tersebut. Cara pembelaan dikemukakan menjadikannya jelas bahawa tertuduh pertama amat maklum tentang tuduhan terhadapnya dan juga cara kes pendakwaan (lihat perenggan 29).

C (5) Walaupun tuduhan tidak dipinda, tertuduh pertama, yang diwakili oleh peguam, tidak dikecualikan daripada memanggil semula atau memerintahkan mana-mana saksi dipanggil semula atau memanggil mereka untuk memberi keterangan lanjut. Tetapi perkara ini tidak dilakukan. Maka, persoalan salah laksana keadilan seperti yang D dihujahkan oleh peguam tidak berbangkit (lihat perenggan 30 & 32); *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314 diikut; *Moosa Abdul Rahman v The State of Kerala* [1982] Cr LJ 1384 dirujuk.

(6) Peninggalan hakim bicara untuk meminda tuduhan sama ada pada E penutup kes pendakwaan atau pada penutup kes pembelaan, agar dapat memadamkan rujukan dalam tuduhan tersebut kepada tertuduh bersama dan kepada s 35 Kanun Keseksaan tidak mengakibatkan apa-apa prejudis atau ketidakadilan kepada tertuduh pertama. Ia tidak menjadikan tuduhan tersebut memperburuk tertuduh pertama. Fakta F bahawa tertuduh bersama yang lain telah dibebaskan tidak memberi kesan ke atas kes terhadap tertuduh pertama. Justeru tiada salah aturan berkaitan sabitan tertuduh pertama atas tuduhan membunuh (lihat perenggan 33).]

G **Notes**

For cases on amendment, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1060–1065.

For cases on Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1262–2016.

H **Cases referred to**

C Mohammad v PP [1974] 1 MLJ 25 (refd)

Hj Maamor bin Hj Abdul Manap v PP [2002] 6 MLJ 668, HC (refd)

Lee Swee Tee v PP [1960] MLJ 161 (refd)

I *Moosa Abdul Rahman v The State of Kerala* [1982] Cr LJ 1384 (refd)

Msimanga Lesaly v PP [2005] 4 MLJ 314, CA (folld)

PP v Harcharan Singh a/l Piara Singh & Anor (Criminal Appeal No 02–22 of 2004(B), unreported) (refd)

Quek Ching Kim v Reg [1956] MLJ 54 (refd)

Tan Boon Liat @ Allen & Anor et al; Tan Boon Liat, Re v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors [1977] 2 MLJ 108, FC (refd)

Teh Thiam Huat v PP [1996] 3 SLR 631, CA (refd)

Legislation referred to

Criminal Procedure Code ss 158, 162, 422
Criminal Procedure Code [IND] s 217
Penal Code ss 34, 35, 302

Appeal from: Criminal Appeal No C-05–27 of 2006 (Court of Appeal, Putrajaya)

Karpal Singh (Sangeet Kaur Deo with him) (Karpal Singh & Co) for the appellant.
Saiful Edris bin Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Raus Sharif FCJ (delivering judgment of the court):

INTRODUCTION

[1] The appellant and six other accused persons were charged for murder under s 302 of the Penal Code read together with s 35 of the same Code. The charge reads as follows:

> Bahawa kamu bersama-sama pada tarikh 1.3.2004, di antara jam pukul 4.00 petang hingga 7.00 petang, bertempat di Penjara Penor, di dalam Daerah Kuantan, di dalam Negeri Pahang Darul Makmur, telah melakukan pembunuhan ke atas Mohd Shukri bin Mohd Yusof, KP No. 850404–06–5179, dengan itu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 dibaca bersama seksyen 35 Kanun Keseksaan.

[2] In the High Court, the appellant, Azhar bin Che Wil was named as the first accused. The other accused persons charged with him were Teyun Thian Eim ('second accused'), Suhaimi bin Nordin ('third accused'), Mohamad Hamdan bin Mohd Yaakob ('fourth accused'), Ahmad Rizal bin Ab Halim ('fifth accused'), Shamsul Darniza bin Ismail ('sixth accused') and Ismail @ Mat Daud bin Deris ('seventh accused'). In this appeal, for ease of reference, they will be referred to as they were in the High Court.

[3] All the accused persons were prison officers and personnel from Penor Prison, Kuantan.

BACKGROUND FACTS

[4] What had happened in this case was this. On 1 March 2004, at about 4pm a remand prisoner at Penor Prison, Kuantan, Mohd Shukri bin Mohd Yusof ('the deceased') attempted to escape. He was then 19 years old. The attempt was discovered and the prison alarm was raised. At about 4.45pm ie about 45 minutes later, the prison officers managed to apprehend the deceased in an area known as Zone Nenas. From there, he was brought through a football field to the main gate of the prison.

[5] It was the prosecution's case that a few prison officers assaulted the deceased while he was at Zone Nenas, at the football field and at the main gate. From the main gate, the deceased was taken to the prison lock-up. At about 5.20pm, the first accused, who was the Head of the Security Unit, directed his subordinate prison officer, Razak bin Fauzi ('PW7') to bring the deceased to a room known as Bilik Unit Kawalan Keselamatan Penjara ('UKK room'). When the deceased was brought to the UKK room, four prison officers were already there. The first accused then ordered the prison officers to leave the room with the exception of PW7.

[6] In the UKK room, the deceased was made to sit on the floor. His hands were handcuffed at the back. PW7 testified that he saw the first accused putting on a pair of rubber gloves and thereafter began kicking and stomping the head of the deceased and his chest several times, causing the deceased's head to hit the concrete wall and concrete floor of the room. PW7 also testified that he saw blood oozing from the deceased's mouth and that he went into a seizure and lapsed into a coma.

[7] Seeing the condition of the deceased, the first accused instructed PW7 to call the prison medical assistant ('PW8'). PW8 arrived and advised the first accused to send the deceased to the hospital. At about 6.30pm, the deceased was taken by a prison van to the hospital. Accompanying the deceased were the first accused, PW7, PW8 and three other prison officers. They arrived at 7pm and throughout the journey the deceased remained in coma without regaining consciousness. He remained in that state until he died on 10 March 2004.

[8] The pathologist and forensic expert, Dr Zahari bin Noor ('PW6') found the death of the deceased was caused by serious internal injury in the head, and that injury was caused by multiple blunt trauma to the head. The multiple blunt trauma had caused sub-arachnoid haemorage in the brain area.

DECISION OF THE HIGH COURT

[9] At the trial, before the commencement of submission at the close of the case for the prosecution, the learned deputy public prosecutor conceded that no prima facie case had been made out against the sixth accused. The learned trial judge accordingly acquitted and discharged the sixth accused.

[10] After hearing submissions by all parties, the learned trial judge made the following findings of facts:

(a) The person ('deceased') named in the charge has died.

(b) That the death of the deceased was caused by serious injury to the head that resulted in sub-arachnoid haemorrhage in the brain area. The injury to the head was caused by multiple blunt trauma to the head.

(c) The deceased was the detainee who escaped from Penor Prison and his escape and recapture started at 4.10pm on 1 March 2004.

(d) In an area, within the Penor Prison compound known as Zone Nenas, the deceased was assaulted by the third accused.

(e) At the football field of the Penor Prison, the deceased was assaulted by the fourth and fifth accused.

(f) At the main gate of Penor Prison, the deceased was assaulted by the second and seventh accused.

(g) At UKK room it was the first accused who assaulted the deceased.

[11] The learned trial judge then concluded that by reflecting on the actual cause of death, namely, the multiple blunt trauma to the head, the only incident that clearly indicates where, when and how the said fatal injury was inflicted on the deceased was only the incident at the UKK room. In all the other incidents, he found no evidence to show such 'multiple blunt trauma' to the head that can possibly cause the haemorrhage to the brain. Thus, by going through the process of elimination through the filtering process of combing the evidence adduced by the prosecution, the learned trial judge found that at the end of the process only the first accused should be answerable for causing the death of the deceased.

[12] The learned trial judge accordingly called the first accused to enter upon for his defence. The remaining five accused persons were acquitted and discharged without their defence being called. At the close of the defence case, the learned trial judge found the first accused guilty. He was convicted of the

charge of murder and sentenced to death.

APPEALS

[13] The public prosecutor appealed against the acquittal of the second, third, fourth, fifth and seventh accused, while the first accused appealed against his conviction and sentence to the Court of Appeal.

[14] On 5 May 2009, both appeals were dismissed by the Court of Appeal. The first accused, as well as the public prosecutor then appealed to this court against the decision of the Court of Appeal.

[15] We heard the public prosecutor's appeal against the acquittal of the second, third, fourth, fifth and seventh accused on 8 December 2009. After hearing the parties, we dismissed the appeal. We affirmed the acquittal of the second, third, fourth, fifth and seventh accused.

[16] The appeal by the first accused was also heard on the same day. After hearing the parties, we adjourned the matter for our consideration and decision.

SUBMISSIONS

[17] Before us, Mr Karpal Singh, learned counsel for the first accused raised only one issue. He submitted that the learned trial judge had erred in not amending the charge under s 302 read with s 35 to one under s 302 only against the first accused at the close of the prosecution's case after acquitting and discharging the second, third, fourth, fifth, sixth and seventh accused persons. Mr Karpal Singh, argued that since the first accused was jointly charged together with other co-accused involving s 35, the learned trial judge should have amended the charge when he called upon the first accused to enter his defence by deleting all reference in the charge to the other co-accused and s 35. It was further submitted that by not amending the charge, the first accused was deprived of his right to recall witnesses and had caused a miscarriage of justice and thus the conviction and sentence of death cannot stand.

[18] Our attention was brought to ss 158 and 162 of the Criminal Procedure Code which respectively state:

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(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

162 Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witness who may have been examined, and may also called any further evidence which may be material.

[19] Mr Karpal Singh then referred to us a number of cases on the applicability of s 162 of the Criminal Procedure Code. These cases are *Quek Ching Kim v Reg* [1956] MLJ 54; *Lee Swee Tee v Public Prosecutor* [1960] MLJ 161; *C Mohammad v Public Prosecutor* [1974] 1 MLJ 25; *Hj Maamor bin Hj Abdul Manap v Public Prosecutor* [2002] 6 MLJ 668; and *Re Tan Boon Liat @ Allen & Anor et al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108.

[20] The learned deputy public prosecutor, on the other hand submitted that the failure on the part of the learned trial judge to amend the charge either at the close of the prosecutor's case or at the close of the defence's case, so as to delete any reference in the charge to the other co-accused and to s 35 is only a minor error and is curable under s 422 of the Criminal Procedure Code. Section 422 reads:

Irregularities not to vitiate proceedings

422 Subject to the provisions contained in this chapter no finding, sentence or order passed or made by the Court of competent jurisdiction shall be revised or altered on account of:

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;

(b) the want of any sanction, or

(c) the improper admission or rejection of any evidence,

Unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[21] He then referred to us to the recent Federal Court case, *Public Prosecutor v Harcharan Singh a/l Piara Singh & Anor* (Criminal Appeal No 05–22 of 2004(B), unreported) and *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314, which are cases on point to the issue raised by Mr Karpal Singh.

FINDINGS

[22] In *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314, one of the issues raised was with regard to the charge which was not so perfectly amended

as to get rid of all reference to the element of the appellant having acted with another. Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal held that it does not render the charge bad for s 34 of the Penal Code does not create a substantive offence but merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons. In the judgment, Gopal Sri Ram JCA, referred with approval to *Teh Thiam Huat v Public Prosecutor* [1996] 3 SLR 631 where Karthigesu JA speaking for the Court of Appeal Singapore in dealing with the same subject said as follows:

> We should, however, mention that an issue was raised that as the capital charge of trafficking was a common intention charged and the learned judge having acquitted the other conspirator, Tay Bee Hoon, the conviction of the appellant without amending the charge was irregular. True, the learned judge did not amend the charge; he found that the appellant alone was in possession of the 40 sachets of heroin and that he failed to make good that he was in possession of the 40 sachets for his and Tay Bee Hoon's consumption. Suffice it to say that s 34 of the Penal Code does not create a substantive offence; it lays down only a rule of evidence to infer joint responsibility per Thean J (as he then was) in *Chota bin Abdul Razak v Public Prosecutor* [1991] 3 MLJ 77; [1991] 1 SLR 675. Accordingly, there was nothing irregular about the appellant's conviction on the capital charge of trafficking.

[23] Recently, this court in *Public Prosecutor v Harcharan Singh a/l Piara Singh & Anor* (Criminal Appeal No 02–22 of 2004(B), unreported) reiterated the same point. In that case, Harcharan Singh a/l Piara Singh together with one Jasbir Singh were charged for murder under s 302 of the Penal Code read together with s 34 of the same Code. Both were convicted but on appeal their conviction were quashed and they were set free. The prosecution being dissatisfied with the result appealed to this court. In the meantime, Jasbir Singh, an Indian national returned to India after his acquittal. The notice of appeal was not able to be served on Jasbir Singh. After several attempts failed, the appeal against Jasbir Singh was withdrawn. The prosecution only pursued the appeal against Harcharan Singh. The issue raised was whether the appeal against Harcharan Singh can succeed when there is no appeal against Jasbir Singh, viewing the case in the light of the allegation of common intention under s 34 of the Penal Code. Gopal Sri Ram FCJ, speaking for this court held:

> It is well established that s 34 of the Penal Code does not create a substantive offence but is merely a rule of evidence to infer joint responsibility for a criminal act performed by plurality of persons. See *Teh Thiam Huat v Public Prosecutor* [1996] 3 SLR 631. It follows that where two or more persons are charged with an offence and s 34 is prayed in aid to alleged common intention, the acquittal of all save one does not render the charge bad against that one who may be lawfully convicted on the charge which contains a reference to s 34.

[24] Mr Karpal Singh urged us to depart from *Harcharan Singh*. With respect, we find no justification to do so. We are of the view that the non-deletion of reference to the co-accused and s 35 in the charge either at the close of the prosecution's case or at the close of the defence's case does not render the charge bad in law. Section 35 like s 34 does not create a substantive offence but merely a rule of evidence open to the prosecution when several accused persons are alleged to be involved in the commission of an offence.

[25] Sections 34 and 35 of the Penal Code are now reproduced in full. They say:

> 34 When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.
>
> 35 Whenever an act, which is criminal only by reason of its being done with criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

[26] From the above, it is clear that s 34 provides for a case in which a criminal act was done by several persons in furtherance of a common intention. However s 35 refers to a situation where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention and each person is liable for the act to the extent of his knowledge or intention. Thus, under s 35, the court has to consider what is the knowledge or intention of each person which joined in committing the act.

[27] *Ratanlal & Dhirajlal's Law of Crimes* in their commentary on s 35 illustrated the following examples:

> A and B beat C who dies. A intended to kill him and knew that the act would cause death. B only intended to cause grievous hurt and did not know his act would cause death or such bodily injury as was likely to result in death. A is guilty of murder and B of causing grievous hurt. Where an assault is made with a sharp-edged or piercing weapon or with a firearm, the assailants may be presumed to know that the result of the causing of injuries with such weapons will very likely be death, and, if death actually results from the assault, everyone of the persons concerned in the act will be guilty of murder.

[28] Taking the above illustrations to our case, it is clear that the only incident that indicates where, when and how the fatal injury was inflicted on the deceased was the incident at the UKK room. The fatal injury that caused the deceased's death was inflicted by the first accused. As for the incidents of

assaults at the Zone Nenas, football field and main gate which involves second, third, fourth, fifth and seventh accused persons, it could not have caused the death of the deceased. Thus, when all the co-accused were acquitted and only the first accused was ordered to enter upon his defence, the first accused must be aware of the evidence against him. This is especially so when he was represented by counsel.

[29] We have scrutinised the record of proceedings with care and we are satisfied that the first accused was in no way misled or prejudiced by the non-amendment of the charge. The way the defence was presented make it amply clear that the first accused has fully appreciated the nature of the charge against him and the nature of the prosecution's case. He had elected to give evidence on oath and in his defence, he alleged that the deceased was already in a very weak condition even before he entered the UKK room as he had to be assisted to walk to the room. However, the learned trial judge found as a fact that there was no evidence to suggest that the deceased was already seriously injured prior to him being brought to the room. On the contrary, the learned trial judge found that there was evidence of several witnesses such as PW7, PW9 and PW10 that the deceased was able to walk on his own, in a normal manner and unaided to the UKK room. The Court of Appeal affirmed the learned trial judge's finding of facts. But this was not an issue before us. Mr Karpal Singh for obvious reason decided not to proceed with this issue.

[30] The only complaint by Mr Karpal Singh was that had the charge been amended, the accused would have had the opportunity to recall or re-summon and examine any witness and to call further evidence which may be material to his defence. But we are of the view that even without the charge being amended, the first accused is not precluded from recalling or re-summoning any witness or to call for further evidence. Cases have shown that even if a charge is amended, but where an accused person is represented by counsel, the trial judge is not obliged to inform the accused person of his right under s 162 to recall any of the witnesses for the prosecution. In *Moosa Abdul Rahman v The State of Kerala* [1982] Cr LJ 1384, the full bench of the High Court of Kerala held that s 217 of the Indian Criminal Procedure Code 1974 (which is in pari materia with our s 162):

> … does not cast a duty or obligation on the court to enquire of the prosecution or the accused whether they would like to recall or re-summon the witnesses … or to call any further witnesses. The omission of the court to 'enquire of the prosecution or the accused whether they would like to exercise the right of re-calling or re-summons the witnesses would not result in any procedural illegality'.

[31] The above proposition was accepted by the Court of Appeal in *Msimanga Lesaly*. Gopal Sri Ram JCA (as he then was) held that where an accused is represented by counsel it is unnecessary for the court to draw

counsel's attention to s 162 of the Criminal Procedure Code or to inquire whether counsel intends to exercise the right conferred by the section.

[32] We endorsed the above view. In the present case, the first accused was represented by counsel. Even though the charge was not amended, there is nothing to prevent the defence from recalling or re-summoning any witness or to call further evidence. This was not done. Thus, the question of miscarriage of justice, as advanced by Mr Karpal Singh does not arise at all.

[33] In conclusion, it is our considered view that the omission on the part of the trial judge to amend the charge either at the close of the prosecution's case or at the close of the defence's case, so as to delete any reference in the charge to the co-accused and to s 35 of the Penal Code did not cause any prejudice or injustice to the first accused. Obviously it does not render the charge bad against the first accused. The fact that the other co-accused have been acquitted, has no bearing upon the case against the first accused. Accordingly, there was nothing irregular as regard the conviction of the first accused on the charge of murder.

[34] For the above said reasons, we dismiss the appeal of the first accused. The conviction and sentence is affirmed.

Appeal dismissed.

Reported by Andrew Christopher Simon